Supreme Court, U.S.
FILED

971357 FEB 17 1998

No. ____ OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1997

JOHN W. THOMPSON; JENNY THOMPSON; JOSEPH N. KARPEN; LEROY BURLING; GLENN THOMPSON; GARY M. KIEDROWSKI; MICHAEL SHEFF; AND ROBERT L. EDMONDS,

Petitioners,

v.

UNITED STATES OF AMERICA; MILLE LACS BAND OF CHIPPEWA INDIANS; ARTHUR GAHBOW; WALTER SUTTON; CARLEEN BENJAMIN; JOSEPH DUNKLEY; ST. CROIX CHIPPEWA INDIANS OF WISCONSIN; LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWAS; BAD RIVER BAND OF LAKE SUPERIOR CHIPPEWA INDIANS; LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN; SOKAOGAN CHIPPEWA COMMUNITY, MOLE LAKE BAND, WISCONSIN; RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA; FOND DU LAC BAND OF CHIPPEWA INDIANS; ROBERT PEACOCK; PETER DEFOE; CLIFTON RABIDEAUX; HERMAN WISE; GEORGE DUPUIS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GARY E. PERSIAN, ESQ.
Counsel of Record
PERSIAN, MacGREGOR & THOMPSON
1530 International Centre
900 Second Avenue South
Minneapolis, Minnesota 55402
(612) 339-6733

Of Counsel:
Stephen G. Froehle, Esq.
Randy V. Thompson, Esq.

Attorneys for Petitioners

1998 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

This petition addresses whether "[t]he privilege of hunting, fishing, and gathering the wild rice upon the lands, the rivers and the lakes included in the ceded territory, . . . during the pleasure of the President of the United States," contained in an 1837 treaty with the Chippewa, 7 Stat. 536, art. V, has been revoked, relinquished, abrogated or terminated by executive actions, subsequent treaties, legislative acts, and judicial decisions, including:

1) Whether the privilege was revoked by executive actions including an 1850 Presidential Order of President Zachary Taylor, which states "the privileges granted temporarily to the Chippewa Indians, by the Fifth Article of the Treaty . . . of July 1837 . . . are hereby revoked."

2) Whether the privilege was relinquished by an 1855 treaty, 10 Stat. 1165, where the Chippewa agreed to "relinquish and convey to the United States any and all right, title, or interest . . . in, and to any other lands in the territory of Minnesota or elsewhere."

3) Whether by virtue of the Nelson Act, 25 Stat. 642 (1889) and the General Allotment Act, 24 Stat. 388 (1887), the Chippewa were subject to state regulation for all off-reservation hunting and fishing activities.

4) Whether the lower courts' characterization of the privilege as an immunity from state regulation rather than a revocable license or other interest "in or to land" is contrary to this Court's holding in Oregon Department of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985).

5) Whether the lower courts' determination that the privilege operates as an immunity from state regulation, unconstitutionally usurps state police powers in conflict with

the principles of federalism embodied in the 10th Amendment of the United States Constitution and the equal footing doctrine.

6) Whether the present litigation against the State is barred by the Indian Claims Commission Act, 60 Stat. 1049 (1946), which provided for an exclusive forum, a statute of limitations, and under which a monetary award was granted to the Chippewa for claims under the 1837 Treaty.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES xii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF REASONS FOR GRANTING PETITION 12

REASONS FOR GRANTING THE PETITION 14

I. ACCORDING TO THE CANONS OF TREATY INTERPRETATION, THE DISTRICT COURT ERRED BY EXAMINING INDIAN UNDERSTANDING WHEN THERE WAS NO FINDING OF AMBIGUITY IN THE 1837 TREATY OR OTHER KEY DOCUMENTS IN THE RECORD. 14

II. THE 1837 TREATY WITH THE CHIPPEWA RESERVED **A PRIVILEGE**, SUBJECT TO STATE REGULATION, NOT A RIGHT TO BE FREE OF STATE REGULATION. 15

III. THE 1850 PRESIDENTIAL ORDER AND SUBSEQUENT EXECUTIVE ACTIONS REVOKED THE TEMPORARY PRIVILEGE. 17

IV. THE TREATY OF 1855 AND THE NELSON ACT EACH SEPARATELY ELIMINATED OFF-RESERVATION HUNTING AND FISHING PRIVILEGES. 20

V. THE LOWER COURTS' RULING IMPROPERLY FRACTURES THE CONSTITUTIONAL STRUCTURE OF FEDERALISM RECOGNIZED BY THE 10TH AMENDMENT AND EQUAL FOOTING DOCTRINE. 22

VI. THE COURT MUST RESOLVE A CONFLICT BETWEEN THE EIGHTH AND NINTH CIRCUITS ON WHETHER THE FINALITY OF THE INDIAN CLAIMS COMMISSION ACT PROCESS BARS A CLAIM FOR AN ADDITIONAL REMEDY UNDER THE SAME TREATY. 24

CONCLUSION 30

TABLE OF AUTHORITIES

Cases **Page**

Ahghazali v. Secretary of Health & Human Services, 867 F.2d 921 (6th Cir. 1989) 26

Amoco Products Co. v. Gambell, 480 U.S. 531 (1987) 6

Bear v. United States, 810 F.2d 153 (8th Cir. 1987) 25

Bowen v. Public Agencies Opposed to Social Security, 477 U.S. 41 (1986) 24

Catawba Indian Tribe of South Carolina v. United States, 982 F.2d 1564 (Fed. Cir. 1993) 26

In re Cherokee Tobacco, 78 U.S. (11 Wall. 616, 621) (1870) 24

Choctaw Nation of Indians v. United States, 318 U.S. 423 (1943) 6, 15

Connecticut Nat. Bank v. Germain, 503 U.S. 249 (1992) 6

Dalton v. Specter, 511 U.S. 462 (1994) 13, 18

DeCoteau v. District County Court, 420 U.S. 425 (1975) 21

De Haro v. United States, 5 Wall. (72 U.S.), 559, 10 L.Ed. 681 (1866) 17

Elk v. Wilkins, 112 U.S. 94 (1884) 16

Fond du Lac Band of Chippewa Indians v. Carlson, No. 5-92-159 (D. Minn. Mar. 18, 1996) 1

Hagen v. Utah, 510 U.S. 399 (1994) 17, 19, 20, 21

Haphey v. Linn County, 924 F.2d 152 (9th Cir. 1991) 25

Harris v. Gillingham, 6 N.H. 9, 23 Am.Dec. 701 (1832) 17

Immigration & Nat. Serv. v. Cardoza Fonseca, 480 U.S. 421 (1985) 6

Kennedy v. Becker, 241 U.S. 556 (1916) 12, 15, 17, 23

Lac Courte Oreilles Band v. Voight, 700 F.2d 341 (7th Cir. 1983) cert. den. 464 U.S. 805 ..... 17, 19, 25, 29

Lane v. Peterson, 899 F.2d 737 (8th Cir. 1990) 25

Menominee Indian Tribe of Wisconsin v. Thompson, 943 F.Supp. 994 (W.D. Wis. 1996) 17, 25

Mille Lacs Band of Chippewa Indians v. Minnesota, 853 F.Supp. 1118 (D. Minn. 1994) (Mille Lacs I) 1

Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F.Supp. 784 (D. Minn. 1994) (Mille Lacs II) .....passim

Mille Lacs Band of Chippewa Indians v. Minnesota, No. 3-94-1226 (D. Minn. March 29, 1996) (Mille Lacs III) .. 1, 6

Mille Lacs Band of Chippewa Indians v. Minnesota, 952 F.Supp. 1362 (D. Minn. 1997) (Mille Lacs IV) 1, 6, 23

Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904 (8th Cir. 1997) (Panel Op.) .....passim

Mole Lake Band v. United States, 139 F.Supp. 938 (Ct. Cl. 1956) 17

Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455 (10th Cir. 1987) 11

Negonsott v. Samuels, 507 U.S. 99 (1993) 15

North American Comm. Co. v. United States, 171 U.S. 110 (1898) 17, 22

Oglala Sioux Tribe v. Homestead Mining Co., 722 F.2d 1401 (8th Cir. 1983) 29

Oglala Sioux Tribe v. United States, 650 F.2d 142 (8th Cir. 1981) 29

Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985) .....passim

Otoe and Missouri Band of Indians v. United States, 131 F.Supp. 265 (Ct. Cl. 1955) 11

Printz v. United States, __ U.S. __, 117 S.Ct. 2365 (1997) 23

Sac & Fox Tribe v. United States, 383 F.2d 991 (Ct. Cl. 1967) 16

South Carolina v. Catawba, 476 U.S. 498 (1986) 6, 15

South Dakota v. Bourland, 508 U.S. 679 (1993) 21

South Dakota v. Yankton Sioux Tribe, __ U.S. __, 1998 WL 23149 (1998) 21

Strong v. United States, 518 F.2d 556 (Ct. Cl. 1975) 16

Sunkyongint Inc. v. Anderson Land & Livestock Co., 828 F.2d 1245 (8th Cir. 1987) 26

United States v. State of Alaska, __ U.S. __, 117 S.Ct. 1888 (1997) 19

United States v. Bouchard, 464 F.Supp. 1316 (W.D. Wis. 1978) 4

United States v. Chippewa Indians, 229 U.S. 498 (1913) 5

United States v. Choctaw & Chickasaw Nations, 179 U.S. 494 (1900) 13

United States v. Dann, 470 U.S. 39 (1985) 11

United States v. Dann, 873 F.2d 1189 (9th Cir.1989) 13, 29

United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 (1876) 24

United States v. Minnesota, 466 F.Supp. 1382 (D. Minn. 1979) aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir. 1980).. 16, 20

United States v. Oregon, 718 F.2d 299, 305 (9th Cir. 1983) 23

United States v. Pend Oreille Public Utility Dist, No. 1, 926 F.2d 1502 (9th Cir.1991) 11, 29

Wahkiakum Band Chinook Indians v. Bateman, 655 F.2d 176 (9th Cir. 1981) 29

Western Shoshone National Council v. Molini, 951 F.2d 200 (9th Cir. 1991) 29

White v. Arco/Polymers Inc., 720 F.2d 1391 (5th Cir. 1983) 26

Winfield Ins. v. Edward Leroux Group Inc., 896 F.2d 483 (11th Cir. 1990) 25

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 13, 18

Other Sources

Page

U.S. Const. amend. X 2

U.S. Const. art. 1, § 8, cl. 3 24

Treaty of July 29, 1837, 7 Stat. 536, art. V ..... i, 2, 11, 13

Treaty of Feb. 22, 1855, 10 Stat. 1165 ..... passim

Treaty of Sept. 30, 1854, 10 Stat. 1109 ..... 2, 18

Nelson Act, Jan. 14, 1889, 25 Stat. 642 ..... passim

Act of Feb. 26, 1857, 11 Stat. 166 2

Act of May 11, 1858, 11 Stat. 285 ..... 2, 23, 24

Act of Dec. 19, 1854, 10 Stat. 598 ..... i, 2

Act of Aug. 13, 1946, 60 Stat. 1049 ..... 2, 11

Act of Sept. 30, 1850, 9 Stat. 944 2

Act of Feb. 27, 1851, 9 Stat. 570 2

1887 General Allotment Act, 24 Stat. 388 21

Exec. Order of Pres. Taylor, Feb. 6, 1850 ..... passim

H.R. Ex. Doc. No. 51-247 (March 4, 1890) 2, 11

Minnesota Territorial Resolution of 1849 ..... 2, 19

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 2

28 U.S.C. § 1343(a)(3), (4) 2

28 U.S.C. § 1362 2

4 Richard R. Powell & Patrick J. Rowhan, Powell on Real Property, Ch. 34 "Easements and Licenses," pp. 34-301 to 34-303 (1997) 22

PARTIES

The caption includes all Respondents, all of whom were plaintiffs at the district court level and appellees at the Eighth Circuit Court of Appeals. The caption does not include two other petitioner groups who were defendants along with these Petitioners at the district court level, and appellants with these Petitioners at the Eighth Circuit Court of Appeals.

The other two petitioner groups include the State of Minnesota and its officials, and a coalition of nine counties located in the geographic area of the 1837 treaty at issue. Specifically, the two additional petitioner groups include:

1. State of Minnesota, Minnesota Department of Natural Resources, and Joseph Alexander, Commissioner of Natural Resources and Arne Carlson, Governor of Minnesota, Rodney Sando, Commissioner of the Minnesota Department of Natural Resources, and Raymond B. Hitchcock, Assistant Commissioner of Operations Minnesota Department of Natural Resources;

2. County of Aitkin, County of Benton, County of Sherburne, County of Crow Wing, County of Isanti, County of Kanabec, County of Mille Lacs, County of Morrison and County of Pine.

OPINIONS BELOW

The August 26, 1997 panel decision of the Eighth Circuit (App. 1-73)[1] is reported at 124 F.3d 904. Final judgment was entered at the district court by way of a January 29, 1997 Opinion (Mille Lacs IV, App. 74) which is reported at 952 F.Supp. 1362. The four district court opinions relevant to the questions presented by this Petition are:

1. Mille Lacs I (App. 351-418), reported at 853 F.Supp. 1118.

2. Mille Lacs II (App. 212-350), reported at 861 F.Supp. 784.

3. Mille Lacs III (App. 164-211), unreported.

4. Fond du Lac (App. 419-481), unreported.

JURISDICTION

The Court of Appeals entered its judgment on August 26, 1997 (App. 1). A timely Suggestion for Rehearing En Banc was denied by a 7 to 2 vote on November 17, 1997 (App. 482). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

---

[1] These Petitioners rely on a **Joint Appendix** entered into with the two other petitioner groups, the State of Minnesota and the nine Counties. References herein to "**App.**" are citations to the Joint Appendix which is being filed in accompaniment to the State's Petition. References herein to "**LA**" refer to the Landowners' Appendix filed at the Eighth Circuit level by these Petitioners. Citations herein to "**SA**" refer to the State's Appendix filed by the State of Minnesota at the Eighth Circuit level.

CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES INVOLVED

1. U.S. Const. amend. X (App. 483).
2. Treaty of July 29, 1837, 7 Stat. 536, art. V (App. 484-489).
3. Treaty of Feb. 22, 1855, 10 Stat. 1165 (App. 502-514).
4. Treaty of Sept. 30, 1854, 10 Stat. 1109 (App. 490-501).
5. Nelson Act, Jan. 14, 1889, 25 Stat. 642 (App. 535-544).
6. Act of Feb. 26, 1857, 11 Stat. 166 (App. 517-521).
7. Act of May 11, 1858, 11 Stat. 285 (App. 515-516).
8. Act of Dec. 19, 1854, 10 Stat. 598 (App. 532-534).
9. Act of Aug. 13, 1946, 60 Stat. 1049 (App. 550-564).
0. Act of Sept. 30, 1850, 9 Stat. 944 (App. 522-527).
11. Act of Feb. 27, 1851, 9 Stat. 570 (App. 528-531).
12. Exec. Order of Pres. Taylor, Feb. 6, 1850 (App. 565).
13. H.R. Ex. Doc. No. 51-247 (March 4, 1890) (App. 545-547).
14. Minnesota Territorial Resolution of 1849 (App. 566-568).

STATEMENT OF THE CASE

The district court's jurisdiction was invoked under 28 U.S.C. §§ 1331, 1362, and under 28 U.S.C. § 1343(a)(3), (4).

In July, 1837, near Fort Snelling, Minnesota, Ojibwe[2] Bands gathered to treat with the United States. This was not their first treaty.[3] The 1837 treaty negotiations were attended

---

[2] "Ojibwe" is the traditional name for the "Chippewa." The Department of Interior currently uses the term "Chippewa," as do the Bands in their official name designations.

[3] In 1825 the Ojibwe had entered into the Treaty of Prairie Du Chien, a treaty designed to separate the hunting lands of the Dakota and

by at least 1,000 members of the Bands, their leaders, representatives of government, traders, and missionaries. The tribal leaders and the United States officials would meet in council, and then break so the Indians could confer among themselves and their allies. The Bands first offered to lease the lands to the United States[4] but this offer was rejected by Wisconsin Territorial Governor Henry Dodge who countered:

> your Great Father, never buys land for a term of years. I will agree on the part of the President that you shall have the free use of the rivers, and the privilege of hunting upon the lands you are to sell to the United States, during his pleasure. If you sell these lands, you must sell them as all the other nations of Indians have done;...

1837 Treaty Journal at 144 (LA. 729). The next day, on July 28, 1837, Governor Dodge stated:

> I will make known to your Great Father, your request to be permitted to make sugar, on the lands; and you will be allowed, during his pleasure, to hunt and fish on them. It will probably be many years, before your Great Father will want all these lands for the use of his white Children.

Ojibwe to reduce continuing warfare between them by separating them geographically. For nearly 200 years prior, these Bands were in contact with French and British groups.

[4] 1837 Treaty Journal at p. 144 (LA. 729). This 60 year proposed lease, with the United States to renegotiate with the Tribe's children, is evidence of the Ojibwe's knowledge and sophistication in land conveyance.

Id. at 146 (LA. 731). One missionary in attendance later suggested problems if removal was attempted "before five years" (LA. 740).

When revoking the privilege in the 1850 Executive Order, President Taylor referred to the privilege as "temporary" (App. 565). Whether "temporary," "probably many years," until wanted "for the use of" white settlers[5] , "five years," or even the rejected "sixty years" of lease, the passage of 160 years has long ago passed all these measures of duration. There is no evidence or suggestion whatsoever in the 1837 Treaty Journal that the President's authority to revoke the treaty privilege was limited by an Indian "misbehavior" standard or a requirement of Chippewa removal. The privilege is not described as "perpetual" in the 1837 treaty, the specific term used by federal negotiators to describe hunting and fishing rights in an 1820 treaty (7 Stat. 206) with the Chippewa of Sault Ste. Marie.

The district court found that the Indians' understanding of the 1837 treaty was modified by assurances allegedly given to the Wisconsin Bands during the 1842 treaty negotiations. Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F.Supp. 784, 799 (Mille Lacs II) (App. 242).[6]

---

[5] Virtually all public domain lands in the 1837 ceded territory in Minnesota have been conveyed out of the public domain by the United States and most public land in the territory, including the Mille Lacs Band trust lands, were once privately owned (LA. 1977-1979).

[6] The fundamental error of finding a "misbehavior" standard for revocation in the 1837 treaty from the 1842 treaty (LA. 8988) originated from United States v. Bouchard, 464 F.Supp. 1316, 1349 (W.D. Wis. 1978) aff'd, 700 F.2d 341, 356 (7th Cir. 1983) (LCO). The 1842 treaty, which is not at issue in this litigation, applies only to upper Michigan and Wisconsin. Nothing from the 1842 treaty modifies the 1837 treaty's terms. The trial court erroneously relied upon the flawed analysis from Bouchard and LCO. Mille Lacs II, 861 F.Supp. at 827 (App. 302).

The idea that the land use privilege would go on forever is undermined by the statements of Chief Flatmouth:

> My Father, if it was my land you was buying, I would, instead of an annuity for only 20 years demand one from you, as long as the ground lasted. You know that without the lands, and the Rivers & Lakes, we could not live. We hunt, and make sugar, & dig roots upon the former, while we fish and obtain Rice, and drink from the latter.

(1837 Treaty Journal, LA. 732). Flatmouth understood that the Chippewas' ability to obtain their living from the lands was temporary.

The Chippewa language was able to convey the 1837 treaty's plain meaning that the privilege lasted "as long as the President allows or as long as the President permits" (LA. 9467-68). The language contained separate word combinations for "forever" and "perpetual" (LA. 9418-9419). While in isolation, "guarantee" might mean "to set firm" (LA. 9437), if the meaning of the "guarantee" in the 1837 treaty was translated in conjunction with "during the pleasure of the President" there would be "probably hundreds" of words available to translate the concept (LA. 9438-9439) such as "promised for a time" or "until the President says" (LA. 9438-9). No record exists of how the 1837 treaty was translated into Ojibwe.

"Removal" and "misbehavior" arose later from the Mille Lac Band's argument, based on an 1863 treaty, that the Band was entitled to damages resulting from settlement of certain parts of their reservation prior to the 1889 Nelson Act cession. United States v. Chippewa Indians, 229 U.S. 498, 33 S.Ct. 811, 813 (1913).

The first standard of treaty interpretation requires a textual ambiguity before the Indians' understanding, or lack of understanding, applies to treaty interpretation.[7] This canon of treaty interpretation was not applied by the lower courts. The Circuit Court deferred to the district court's findings as to the parties' treaty understandings (Panel Op., App. 37) and then applied the same treaty interpretation standard utilized by the district court.[8] "We look first at the interpretation understood by the Bands" (Panel Op., App. 36). The district court, in five key instances specifically did not find that there was a textual ambiguity,[9] yet still ruled for the Bands based on a finding that the Indians did not understand the plain meaning of the treaties and the 1850 Order.

In 1850 President Taylor issued an Order specifically revoking the 1837 treaty privilege (App. 565). President Franklin Roosevelt, on March 1, 1938, wrote to the Bad River

---

[7] South Carolina v. Catawba, 476 U.S. 498, 506 (1986); Choctaw Nat. of Indians v. United States, 318 U.S. 423, 432 (1943); see also, Amoco Prod. Co. v. Gambell, 480 U.S. 531, 557 (1987); Connecticut Nat. Bank v. Germain, 503 U.S. 249, 112 S.Ct. 1146, 1149 (1992); Immigration & Nat. Serv. v. Cardoza Fonseca, 480 U.S. 421, 452 (1985) (Justice Scalia concurrence).

[8] The "first rule is that Indian treaties must be construed as the Indians understood them." Mille Lacs II, 861 F.Supp. at 822, App. 300); and "first, treaties must be construed as the Indians understood them" Mille Lacs Band of Chippewa Indians v. Minnesota, No. 3-94-1226 (D. Minn. 1997) at 27, (Mille Lacs III), App. 193. "[T]he first rule of construction applicable to the interpretation of Indian treaties requires the treaty language be construed as the Indians understood them, ..." Mille Lacs Band of Chippewa Indians v. Minnesota, 952 F.Supp. 1362, 1376 (D. Minn. 1997) (Mille Lacs IV), App. 102.

[9] No ambiguity found regarding: "privilege" and "during the pleasure of the President" language from the 1837 treaty, the 1850 Order, the 1855 treaty language, or the 1889 Nelson Act language.

Chippewa Band and confirmed that the 1850 Order revoked the 1837 treaty privilege (letter at App. 575). In the 1950's, the Fond du Lac and Wisconsin Bands participated in Court of Claims litigation and filed pleadings with the Court claiming:

1. "A temporary right to remain in the [1837] ceded area during the pleasure of the President was granted to these Indians. This right was terminated by Executive Order of February 6, 1850. No other action was required to terminate this temporary right" (LA. 11130).

2. "This privilege [1837] was clearly temporary in character . . ." (LA. 11122).

3. "This privilege of hunting, fishing and remaining in the ceded areas (granted to these Indians temporarily) was terminated by Executive order of February 2, 1850. . . ." (LA. 11122).

4. "The Order of February 6, 1850, was never revoked nor extended" (SA. 499).

Nevertheless, the district court in Mille Lacs II stated that, "[t]he evidence shows that the only reason that the 1850 Executive order included language extinguishing the hunting, fishing, and gathering privilege was to facilitate removal of the Chippewa . . ." Id., 861 F.Supp. at 825, App. 310. The Circuit Court concluded that "there is no evidence that revocation of usufructuary rights would have been made independently of the removal mandate" (Panel Op., App. 29-30).[10] The record contains substantial evidence that there

[10] The Circuit Court did not address the district court's conclusions that removal had been suspended, and privilege revocation required misbehavior.

were other valid reasons for the 1850 Order stemming from federal land alienation policies, which drove federal Indian policy (LA. 7390, 10611, 10635, 10679-80, 10640). Unrefuted expert testimony of a historical geographer was introduced on this point.

The President authorized all land sales and issued all federal land patents.[11] The 1850 Executive Order was issued "to remove the occupancy and use rights that had been temporarily granted to the Chippewa in 1837 . . . to facilitate selling the public domain by removing any aboriginal claims to the title to such lands . . ." (LA. 7390) so lands could be sold and settlement encouraged. The survey, sale, and patent process was inconsistent with, and terminated, the treaty privilege. An 1836 Opinion of the Attorney General of the United States confirms that the issuance of land patents terminated any pre-existing Indian use rights.

> [I]n my opinion, the . . . Article of the Treaty . . . with the Chippewa Indians by which 'the Indians stipulate for the right of hunting on the lands ceded with the other usual privileges of occupancy until the land is required for settlement' must be regarded as reserving the use of the ceded land for all the purposes of Indian occupancy as it existed prior to the treaty until such lands shall have been actually disposed of to individuals by the United States. Such disposition may be made by sale under the general

---

[11] The land patent granted by President Cleveland in 1895 to one of these Petitioners' predecessor in title with respect to property in the 1837 territory, expressly provided: "TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature, thereunto belonging, unto the said John Colson and his heirs and assigns, forever." (App. 549) (emphasis added).

> laws or by special grants, or in any other way that Congress may direct. And whenever an actual disposition of any particular tract shall be made, the usufructuary right of the Indians will cease as to such tract.

(LA. 10663-4).

The authorizing statute for the 1855 Treaty, 10 Stat. 598, called for the "extinguishment of [Chippewa] title to all of lands owned and claimed by them in the territory of Minnesota and State of Wisconsin" (App. 532) and the Act made clear that "[t]he laws of the United States and the Territory of Minnesota shall be extended over the Chippewa Territory in Minnesota whenever the same may be ceded, and the same shall cease to be 'Indian country' . . . ." 10 Stat. 598 (App. 533). Thereafter, the Mille Lacs Band entered into the 1855 treaty, 10 Stat. 1165 (App. 502), and accepted a reservation in anticipation that the Chippewa would settle in one place, cultivate the soil, open farms, build houses, and educate their children (1855 Treaty, 10 Stat. 1165, art. IX, App. 513). The Chippewas' lead negotiator, Hole-In-The-Day, was convinced that the Chippewa would live in poverty if they did not change their habits and ideas of acquiring wealth (LA. 809, Transcript of 1855 proceedings). During the 1855 treaty negotiations, he stated:

> We want to change our habits and customs and live like the whites.... You want us to work, to change our habits, and live like the whites, and I see the benefit of your advice, and so do the Chiefs.

(LA.828).[12]

---

[12] "We want the right of suffrage, the right to vote, to be subject to your laws, and we have set our hearts upon it." (Hole-In-The-Day

> It is very essential that the Indians shall be thrown on their own resources. The country is getting scarce of game, and we cannot get along without changing our habits. We have tried the old system, and found it wanting. We should therefore try a new one.

(Hole-In-The-Day statement, 1855 negotiations, LA. 836). The Circuit Court nevertheless found that the absence of a specific reference to usufructuary "rights" in the 1855 treaty meant that the federal government did not intend to extinguish the hunting and fishing privilege by the 1855 cession and neither the federal government nor the Bands understood the 1855 treaty to have that effect (Panel Op., App. 35-36).

In 1889 Congress passed the Nelson Act, 25 Stat. 642 (App. 535), calling for the sale and relinquishment of all Chippewa reservations in Minnesota except for White Earth and Red Lake. The consent of the Chippewa Bands was obtained, and the cessions were approved by the President on March 4, 1890 (App. 546-7). During the Nelson Act negotiations on October 4, 1889, in counsel with the Mille Lacs Band, U.S. Commissioner Henry Rice was asked about off-reservation hunting.

> **MUH-ENG-AUNCE** . . . Another thing about the wild animals. If an Indian wishes to go outside of the reservation to hunt deer, will he be allowed to do so in the hunting season? . . .
>
> **MR. RICE** . . . In regard to hunting deer, that is a matter for the Legislature of the State to determine. You can hunt deer in any event, wherever you find them during the

---

statement, 1855 negotiations, LA. 830) (emphasis added).

> season set apart for hunting; and wherever the white man may hunt, your young men will have the same right to do so. . . .

(H.R. Exec. Doc. 247, 51st. Cong., 1st Sess. (1890) at 169 (LA. 945) (emphasis added). The Circuit Court did not address the Nelson Act defense appealed by these petitioning Landowners.

In 1946 Congress enacted the Indian Claims Commission Act, 60 Stat. 1049 (App. 550) which created a Commission with the broadest jurisdiction and powers to resolve all Indian claims against the government once and for all.[13] Through their tribes, these Bands filed claims at the Indian Claims Commission alleging interference with their 1837 hunting and fishing privilege, later amending their Petition to include claims for all unconscionable consideration under the 1837 treaty. The hunting and fishing privilege was part of the consideration for the 1837 cession, and in 1974 these Chippewa Bands were awarded over nine million dollars in damages by the Commission for their 1837 treaty claims.

---

[13] See Otoe and Missouri Band of Indians v. United States, 131 F.Supp. 265 (Ct. Cl. 1955) (legislative history of effort to pass ICCA); Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455 (10th Cir. 1987); United States v. Dann, 470 U.S. 39 (1985); United States v. Pend Oreille Public Utility Dist, No. 1, 926 F.2d 1502, 1508 (9th Cir. 1991).

SUMMARY OF REASONS FOR GRANTING PETITION

Animated by the desire to discover a long extinguished hunting and fishing "right" for the Chippewa, the lower courts' decisions, in unrestrained judicial activism, move in a new direction for Indian law contrary to this Court's fundamental principles. The Supreme Court's development of Indian law charts a course for the lower courts to follow. Because of the unique nature of United States/Indian relations, set against the American settlement of the continent and the interplay of state and federal powers, this is akin to a navigational chart through a difficult sea. The Supreme Court has established definite markers for the lower courts, and those ships should follow within its wake. In this case, a ship has broken ranks and is sailing away, far off course.

Unless the Supreme Court takes command of this ship's rudder, and reverses direction, other lower courts will be encouraged to rewrite history and follow this errant course:

> (1) A temporary privilege to hunt and fish has been transformed from an interest "in or to land" into an immunity from state regulation, giving the Chippewa de facto co-management power with the State over half of the natural resources in a twelve county area of Minnesota, under the perpetual supervision of the federal court. Kennedy v. Becker, Oregon Department of Fish & Wildlife v. Klamath Indian Tribe,[14] and the Tenth Amendment no longer provide guidance.

---

[14] Kennedy v. Becker, 241 U.S. 556 (1916); Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985).

(2) The President's 1850 Order revoking the 1837 Treaty privilege, affirmed by a subsequent Congress and Presidents, and issued under the express and unambiguous language of the treaty creating the privilege, is canceled by judicial decision 140 years later. Youngstown Sheet & Tube, Dalton v. Specter, and United States v. Choctaw & Chickasaw Nations,[15] are not on this ship's map.

(3) The 1855 Treaty whereby Chippewa "fully and entirely relinquish . . . any and all right, title and interest, of whatsoever nature . . . in, and to any other lands" does not terminate the 1837 privilege, nor does the 1889 Nelson Act cession, because the privilege is not an interest in or to land, but instead is a newly minted judicial exemption from state police power. Klamath just passed on the starboard side.

(4) The finality required by the Indian Claims Commission Act, under which these Bands received payments for the lands and waters at issue, without offset for hunting and fishing, does not bar a suit to set aside the Presidential Order, because the suit is now filed against the State of Minnesota in a collateral attack. Klamath and United States v. Dann, 873 F.2d 1189 (9th Cir.1989) cert. den., 493 U.S. 890 (1989), sink as this ship, buoyed by the opening floodgates, surges into uncharted waters.

Nothing less than whether the history of American/Indian affairs was writ by the historical participants, or will be rewritten by the federal district courts, hangs in the balance.

---

[15] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Dalton v. Specter, 511 U.S. 462 (1994); United States v. Choctaw & Chickasaw Nations, 179 U.S. 494 (1900).

The decisions by the lower courts challenge or ignore numerous Supreme Court decisions, the authority of Congressional acts and treaties, and Presidential power in Indian affairs. At stake is the Supreme Court's principled approach to Indian law, the separation of powers, and the very Constitutional structure of state and federal relations which are all implicated by the underlying dispute. Landowners submit this Petition for Certiorari of this case of exceptional public importance[16] which will impact 4.4 million Minnesotans, and devalue the lands and businesses of thousands of landowners and business owners. The Eighth Circuit decision allows 24,000 Band members the permanent right to take, without regard to State law and under de facto co-management authority, up to 50% of the harvestable natural resources in a twelve county area.

REASONS FOR GRANTING THE PETITION

I. ACCORDING TO THE CANONS OF TREATY INTERPRETATION, THE DISTRICT COURT ERRED BY EXAMINING INDIAN UNDERSTANDING WHEN THERE WAS NO FINDING OF AMBIGUITY IN THE 1837 TREATY OR OTHER KEY DOCUMENTS IN THE RECORD.

Article V of the 1837 Treaty (App. 486) states:

---

[16] The United States' attorney represented in open court on 10/19/93: "This case is not a parochial case that strictly deals with the fate of the treaty rights of the Mille Lacs Band . . [I]t will impact upon Indian tribes throughout the country . . There are tribes all over this country who are going to be watching this case closely, and watching the United States' role in it, and will be taking actions as a result of the decisions reached in this case, as will the United States" (Hearing Trans pp. 5-6, Ex. A to SGF 11-1-93 Aff., LA. 8295).

> [t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States.

No finding of textual ambiguity exists in five key instances: 1837 treaty "privilege" exists "during the pleasure of the President"; the 1850 Presidential order; 1855 treaty; and the 1889 Nelson Act. A court may not look at Indian understanding or expand the text beyond its clear terms to remedy a claimed injustice or to achieve the asserted understandings of the parties.[17]

II. THE 1837 TREATY WITH THE CHIPPEWA RESERVED **A PRIVILEGE**, SUBJECT TO STATE REGULATION, NOT A RIGHT TO BE FREE OF STATE REGULATION.

Kennedy v. Becker explained the key distinction between a **privilege** to hunt and fish and a **right** to hunt and fish.

> Even if the tribe had expressly reserved a 'privilege of fishing and hunting' on the ceded lands, our precedents demonstrate that such an express reservation would not suffice to defeat the state's power to reasonably and even handedly regulate such activity.

---

[17] South Carolina v. Catawba, 476 U.S. 498, 506 (1986); Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943); see Negonsott v. Samuels, 507 U.S. 99, 104 (1993).

Klamath, 473 U.S. at 768-769 (citing, Kennedy). Because a **privilege** is different than a **right**, state regulation on a basis equal to all citizenry is not foreclosed even if the 1837 Treaty privilege still exists.[18] The lower courts failed to acknowledge the 1837 **privilege** as an interest in or to land, instead describing this "treaty right" as an immunity from law. Classifying the usufructuary "privilege" as an immunity from state regulatory authority implicates the Tenth Amendment and opens the floodgates to hunting and fishing claims in a manner rejected by this Court in Klamath.[19] Specifically, the Klamath Tribe's brief argued "a right to hunt and fish free of state regulation is a right separate and apart from an interest in the property itself." (LA. 8668). This argument, rejected in Klamath, has found new life in Mille Lacs.

The Eighth Circuit erroneously concluded that the 1855 Treaty, which created the Mille Lacs Reservation, was concerned with the extinguishment of Indian title to all the land owned and claimed by them, and that extinguishment of title, and sale of land, did not concern usufructuary rights. (App. 36-37). Indian title, of course, included the privilege to hunt and fish.[20] A privilege to hunt and fish is an interest in or

---

[18] As non-citizens in 1837, after the land sale, Band members did not hold the privilege to hunt and fish at all, absent the 1837 treaty privilege. Elk v. Wilkins, 112 U.S. 94, 123 (1884); Lund testimony LA. 9690.

[19] The trial court, over Landowners' objections, allowed law Professor Thomas Lund to testify as an expert on "wildlife law" to support the immunity theory. Professor Lund's theory was briefed by the Klamath Tribe to the Supreme Court in Klamath to support the Tribe's argument, and the Klamath decision rejects the argument. Id.

[20] Sac & Fox Tribe v. United States, 383 F.2d 991, 997 (Ct. Cl. 1967) (cert. den., 389 U.S. 900) (as cited in, Strong v. United States, 518 F.2d 556, 560 (Ct. Cl. 1975)); United States v. Minnesota, 466 F.Supp. 1382 (D. Minn. 1979) aff'd sub nom. Red Lake Band of Chippewa

to land, not an immunity from regulation. Kennedy, 241 U.S. at 562-564.[21]

III. THE 1850 PRESIDENTIAL ORDER AND SUBSEQUENT EXECUTIVE ACTIONS REVOKED THE TEMPORARY PRIVILEGE.

The 1837 Treaty language granted a temporary privilege that could be revoked by the President at his will. "The most probative evidence . . . is of course the statutory language . . ." of the treaty. Hagen v. Utah, 510 U.S. 399, 411 (1994). The unambiguous language of the 1837 Treaty granted the President power to revoke the privilege by its plain terms: "during the pleasure of the President."[22]

> When the President acts pursuant to an express or implied authorization of Congress, the executive action 'would be supported by the strongest of presumptions and the widest latitude of judicial

---

Indians v. Minnesota, 614 F.2d 1161 (8th Cir. 1980); Lac Courte Oreilles Band v. Voight, 700 F.2d 341, 351-52 (7th Cir. 1983) (cert. den. 464 U.S. 805).

[21] Klamath, 473 U.S. at 768-69; Menominee Indian Tribe of Wisconsin v. Thompson, 943 F.Supp. 994, 1018 (W.D. Wis. 1996); see North American Comm. Co. v. United States, 171 U.S. 110, 137 (1898).

[22] See, De Haro v. United States, 5 Wall. (72 U.S.), 559, 10 L.Ed. 681 (1866) (a license is a personal privilege revocable at the pleasure of the party making it); see also, Harris v. Gillingham, 6 N.H. 9, 23 Am.Dec. 701 (1832) (permission to occupy "during the pleasure" of the owner was a license revocable at will); Mole Lake Band v. United States, 139 F.Supp. 938, 940 (Ct. Cl. 1956) cert. den. 352 U.S. 892 (analyzing the 1837 treaty privilege as a "revocable license").

> interpretation, and the burden of persuasion would rest heavily upon anyone who might attack it.'

Youngstown Sheet, 343 U.S. at 637 (Jackson J. concurring). Judicial deference was reaffirmed in Dalton where the Court held that "how the President chooses to exercise the discretion Congress had granted him is not a matter for our review." Id. 511 U.S. at 476. When a statute commits a decision to the discretion of the President, judicial review of that decision is not available. Id. at 477. Arguments including whether or not the President's order was: carried out (or understood) fully by subordinate officers, exceeded his statutory authority, was based on poor recommendations, or did not follow procedural niceties, have all been rejected by Dalton as a basis of invalidating presidential authority.

The attempt to invalidate the President's 1850 order revoking the privilege by applying a "misbehavior" standard for "removal" is unavailing because, even if applicable, these arguments do not make the order unconstitutional. If the President exceeded his statutory authority, that is insufficient under Dalton. Moreover, there is simply no evidentiary or textual support for the proposition that the 1837 Treaty contained either a misbehavior or removal standard for privilege revocation. The Eighth Circuit refused to apply the standard mandated by Youngstown and Dalton. If there is any basis to affirm the President's order, it must be affirmed.

The Circuit Court erroneously dismissed the idea that the President could revoke the privilege without ordering removal,[23] (Panel Op., App. 29). Valid reasons for revoking

---

[23] The 1854 Treaty, 10 Stat. 1109, granting reservations to the Wisconsin tribes after they refused to move to Minnesota following the 1850 Order, establishes the intent of the parties to remove the Wisconsin Chippewa to reservations in lieu of removal to Minnesota. The Petitioners intend to argue this issue on appeal if Certiorari is granted.

the privilege in 1850 existed.[24] Under Hagen, the President's interpretation of the 1837 privilege is to be given great weight as "clear evidence of the understanding at the time." Hagen at 420. The President's 1850 Order described the privilege as "temporary" (App. 565). The Circuit Court's decision even fails to acknowledge that the 1850 Order's revocation of the privilege was reaffirmed by President Franklin Roosevelt in 1938 (App. 575). The President's "pleasure" was further expressed by President Cleveland in 1895 when he (and other Presidents) issued patents for the ceded area granting settlers "all rights, privileges, immunities . . . of whatsoever nature . . . forever" (App. 549).[25]

While the Bands will argue that this case simply follows Lac Courte Oreilles Band, 700 F.2d 341, that argument fails to acknowledge key differences. LCO had a different factual record and did not involve the 1855 Treaty. LCO also was decided before Klamath's decision on the express language of

---

[24] Wisconsin statehood had occurred in 1848. Minnesota became a territory in 1849. The population of Wisconsin was exploding exponentially, and the President was being urged by many in the Minnesota-Wisconsin area to issue an order terminating the privilege to encourage settlement and clear title to the public domain to encourage land sales (1849 Territorial Resolution, App. 566, LA. 7390, 10611, 10608, 10679, 10630, 10640, 10663-64).

[25] Even if one assumes arguendo that the President did not have the statutory power from the 1837 treaty to issue the 1850 order because of the Bands' understanding regarding removal, **Congress ratified the revocation** of the privilege when: appropriating money to carry out the Order (9 Stat. 944, 9 Stat. 5701 [App. 525, 530]); ratifying the 1855 treaty; passing Minnesota's Enabling Statute which was silent with respect to the privilege or any limit on State police power; and ratifying the Nelson Act Agreement whereby the Bands agreed to be subject to all State law. See United States v. State of Alaska, 117 S.Ct. 1888, 1910-1911 (1997).

cession, and the Hagen and Dalton analysis of Presidential power in Indian affairs. See also footnotes 6 and 35.

IV. THE TREATY OF 1855 AND THE NELSON ACT EACH SEPARATELY ELIMINATED OFF-RESERVATION HUNTING AND FISHING PRIVILEGES.

The Supreme Court in Klamath affirmed United States v. Minnesota, 466 F.Supp 1382, 1385 (D. Minn. 1979), aff'd sub. nom. Red Lake Band v. Minnesota, 614 F.2d 1161 (1980) holding that the express language of cession is "precisely suited" to extinguish all hunting and fishing rights or privileges.[26] Id. Neither the trial court nor the Panel decision even references Red Lake, an omission made more astounding by the fact that the Red Lake decision was supported by what Henry Rice told the Mille Lacs Band during the 1889 Nelson Act (25 Stat. 642) proceedings: off-reservation hunting is a "matter for the Legislature of the State to determine." See supra, [LA.945]; United States v. Minnesota, 466 F.Supp. at 1387.

The Eighth Circuit's attempt to distinguish Klamath is unavailing. First, the Eighth Circuit claims that the 1855 Treaty language was not "explicit" (Panel Op., App. 36) in revoking the 1837 privilege, but Klamath rejected the need for a specific reference in the face of the general language of cession. Klamath at 768. The proper test is whether there has

---

[26] The 1855 treaty, 10 Stat. 1165, contained language first conveying a specific tract of land (App. 502), and then added the separate and additional provision that the "Indians do further fully and entirely relinquish and convey to the United States, any and all right, title and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." (App. 503), see Klamath, 473 U.S. at 768.

been an express reservation of the privilege following the **general language** of cession. Id. at 772-773. The Eighth Circuit erroneously limits Klamath to exclusive on-reservation rights versus non-exclusive off-reservation rights, a distinction without a difference (App. 39).[27] Both exclusive rights and non-exclusive privileges are interests in or to land, and are eliminated by the general language of cession. Klamath, at 768.

The Nelson Act, 25 Stat. 642, together with the 1887 General Allotment Act, 24 Stat. 388, extinguished all Chippewa reservations in Minnesota except two. This Court has consistently ruled that sales of reservation lands, without an express reservation of sovereignty, convey any sovereignty and Indian jurisdiction with respect to the soid lands. Hagen; South Dakota v. Bourland, 508 U.S. 679 (1993); See DeCoteau v. District County Court, 420 U.S. 425, 442-447 (1975); South Dakota v. Yankton Sioux Tribe, ___ U.S. ___, 1998 WL 23149 (1998). In like manner, through the 1855 treaty the Bands ceded any jurisdiction and pre-existing immunity regarding the 1837 treaty area in Minnesota except for those portions of the newly created Mille Lacs reservation that were in the 1837 ceded area.[28] Then, through the 1889 Nelson Act, any immunity from hunting and fishing laws with respect to the former reservation lands was relinquished.

---

[27] The converse is actually true: exclusive on-reservation rights are subject to a more stringent extinguishment test than a non-exclusive, off-reservation privilege. As a license, a privilege is lost by a wide variety of inconsistent actions. See footnote 29.

[28] The original Mille Lacs reservation created in 1855 and last ceded in 1889, encompassed 61,000 acres. The 1837 treaty area encompasses more than 6.5 million acres.

V. THE LOWER COURTS' RULING IMPROPERLY FRACTURES THE CONSTITUTIONAL STRUCTURE OF FEDERALISM RECOGNIZED BY THE 10TH AMENDMENT AND EQUAL FOOTING DOCTRINE.

By failing to recognize the treaty privilege as a revocable license,[29] the district court departed from established principles,[30] holding that the United States "may convey its ability to regulate taking of the wildlife it owns." Mille Lacs II, 861 F.Supp. at 834. In North American Comm. Co. v. United States, 171 U.S. 110, 137 (1898), this Court ruled to the contrary.

> Their regulation [of seal fisheries] involved the exercise of power as sovereign and not as a mere proprietor. Such [federal] governmental powers cannot be contracted away, and it is absurd to argue that in this instance there were any attempts to do so . . .

---

[29] "A license is revocable by any manifestation of the licensor's intent to end it. This manifestation may be a formal express notice of revocation, or it may consist of conduct obstructing the erstwhile permitted use, or otherwise inconsistent with the license's continued existence. . . . A license ends on the . . . conveyance of the servient estate by the licensor" 4 Richard R. Powell & Patrick J. Rowhan, Powell on Real Property, Ch. 34 "Easements and Licenses," pp. 34-301 to 34-303 (1997).

[30] Professor Lund also advanced his theory that hunting and fishing rights were not interests in land in Menominee II which specifically rejected this "fallacy in plaintiffs' argument . . .." Menominee II, 943 F.Supp 999, 1018. This is the same argument the Klamath Tribe advanced to the Supreme Court in December of 1984, citing to Professor Lund's 1976 article (Klamath Tribe's Supreme Court brief at LA. 8664-5). See footnote 19, supra.

Id.

The Eighth Circuit erred when stating "[t]here is no federal law commanding state regulation here" (Panel Op. p. 51 n. 44, App. 58). A treaty interpretation which requires[31] the State to allow hunting and fishing by Indian citizens under a separate set of rules created under a different standard,[32] and to oversee implementation of two sets of laws, is contrary to the federal government's historical interpretation of the privilege, and violates Kennedy, Klamath, and Printz v. United States, __ U.S. __, 117 S.Ct. 2365 (1997).

The 10th Amendment issue is whether the federal government, through the 1837 pre-statehood treaty, preempted and usurped state police power when the 1858 Enabling Act for Minnesota, 11 Stat. 285 (App. 515), is silent with respect to any such constraint. Bear in mind that when Minnesota became a state in 1858, the 1837 treaty privilege had already been revoked by a President who labeled it temporary, and was subject to the 1855 treaty relinquishment of all interests in and to land by language of general cession. Such a pre-statehood treaty provision could only bind the state if it concerned a matter where there is clear federal preemption and the limit on State authority is specifically set forth in the

---

[31] When compiling and negotiating the Band Hunting and Fishing Code, the State did not do so "voluntarily," but pursuant to the district court's requirements Mille Lacs II, 861 F.Supp. 784, 838-9 (D. Minn. 1994).

[32] In order for the State to include a regulation in the Band Hunting and Fishing Code, it had to "put forth specific evidence establishing why the regulation is a measure '**to forestall the imminence of extinction**'" (Mille Lacs IV, at 39, App. 119) (emphasis added) (citing, United States v. Oregon, 718 F.2d 299, 305 (9th Cir. 1983)).

Enabling Act (App. 515).[33] There is no constitutional basis for preemption of state police power. While Congress has plenary power over Indian tribes it does not have plenary power over states. Congress never stated in the Enabling Act that the temporary privilege would limit Minnesota's sovereignty by acting as a permanent immunity.[34] Therefore, if the privilege still exists, it cannot interfere with the State's normal regulatory plan by requiring a different set of rules for one group of citizens, and necessitating changes in the State's laws.

States do not cede sovereignty and jurisdiction by way of Indian understanding. If the Bands did not understand the course of events, the Chippewa Bands had, and received, a remedy from the Indian Claims Commission. If the United States owes any further obligation to the Bands, it cannot solve its dilemma by taking power from a state, and the lower courts lacked the constitutional authority to do so.

VI. THE COURT MUST RESOLVE A CONFLICT BETWEEN THE EIGHTH AND NINTH CIRCUITS ON WHETHER THE FINALITY OF THE INDIAN CLAIMS COMMISSION ACT PROCESS BARS A

---

[33] "Sovereign power . . . is an enduring presence . . . and will remain intact unless surrendered in unmistakable terms." Bowen v. Public Agencies Opposed to Social Security, 477 U.S. 41, 106 S.Ct. 2390, 2397 (1986). When analyzing Minnesota's Enabling Act (11 Stat. 285) to determine whether there is a constraint on police power, the "clear expression" for treaty abrogation standard is inapplicable. In re Cherokee Tobacco, 78 U.S. (11 Wall. 616, 621) (1870).

[34] United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 (1876) is consistent with this analysis since regulation of Indian commerce is within the federal government's constitutionally delegated preemptive power (U.S. Const. Art. 1, § 8 cl. 3). Further, there was a plain statement in the Act that the federal power at issue would continue after statehood (93 U.S. at 194).

CLAIM FOR AN ADDITIONAL REMEDY UNDER THE SAME TREATY.

Even if these Chippewa had not prosecuted claims under the 1837 treaty before the ICC, which they have, their claims to reestablish the 1837 treaty privilege would be barred because the ICC was the exclusive forum for their claims for wrongful federal conduct. 60 Stat. 1049 (1946) (App. 550).[35] Treaty claims are subject to the rules of res judicata[36] and election of remedies.[37] The Bands are not entitled to re-litigate issues that were or could have been raised in a previous action. Bear v. United States, 810 F.2d 153, 157 (8th Cir. 1987). "The issue of usufructuary rights arose in various cases brought before the [Indian Claims] Commission under the enabling legislation" Menominee Indian Tribe of Wisconsin v. Thompson, 943 F.Supp. 994, 1017 (W.D. Wis. 1996). "The Claims Commission was not only authorized to consider compensation for lost usufructuary rights but it did so in a number of instances." Id. The initial Docket 18 Petition

---

[35] The defenses associated with the Indian Claims Commission Act and the Chippewa Bands' receipt of an award in Docket 18-C, were never raised in any of the Lac Courte Oreilles Wisconsin and Seventh Circuit litigation concerning the 1837 and 1842 treaties.

[36] While the State only pursued a collateral estoppel argument on appeal (Panel Op. p. 40, n. 36, App. 44) Landowners appealed their arguments that the ICC damage award in Docket 18-C barred the instant claims by **res judicata**, accord and satisfaction, payment, release, election of remedies as well as collateral estoppel.

[37] The election of remedies doctrine bars a second remedy when damages have been received under the same basic facts and claim. Lane v. Peterson, 899 F.2d 737, 744 (8th Cir. 1990); Haphey v. Linn County, 924 F.2d 152 (9th Cir. 1991); Winfield Ins. v. Edward Leroux Group Inc., 896 F.2d 483, 488 (11th Cir. 1990).

of the Chippewa specifically claimed the United States had denied to the Indians their right to hunt and fish upon the 1837 ceded lands, and that the usufructuary "rights" were "a material consideration" for the land cessions under various treaties, including the 1837 treaty. The Chippewa Bands had a full and fair opportunity to pursue damages for the taking of the hunting and fishing privilege before the ICC. Therefore, this suit is barred by collateral estoppel.

The Bands were well aware of their claims for the hunting and fishing treaty privilege in 1946. The Bands specifically raised the claim in their original Docket 18 Petition. In 1931 Band members were convicted of hunting violations in the 1837 ceded territory (LA. 2742-2747). President Roosevelt confirmed the effect of the 1850 Executive Order in 1938 (App. 575). The Bands admitted as much in their Court of Claims pleadings in the 1950's.[38] The district court lacked jurisdiction to grant equitable relief to the Bands enjoining enforcement of State law because the Bands' claims were barred by the ICCA's five year statute of limitations. Catawba Indian Tribe of South Carolina v. United States, 982 F.2d 1564, 1568-1569 (Fed. Cir. 1993).

The Bands have already been paid in full for the treaty privilege. There was no separate finding by the Commission (ICC) as to the value of the treaty privilege because the Bands and the Commission knew that damages for the "highest and most valuable uses" of the lands and waters (Panel Op., App. 47) (emphasis added) were best measured by the timber value,

---

[38] The contents of the original Docket 18 Petition, and other ICC and Court of Claims pleadings are admissions against interest, and also support an argument of judicial estoppel. Sunkyongint Inc. v. Anderson Land & Livestock Co., 828 F.2d 1245 (8th Cir. 1987); Ahghazali v. Secretary of Health & Human Svc., 867 F.2d 921 (6th Cir. 1989); White v. Arco/Polymers Inc., 720 F.2d 1391 (5th Cir. 1983).

and this encompassed damages for the hunting and fishing uses of the property. Klamath, 473 U.S. at 773-4. The Chippewa admitted in their Docket 18-S[39] action before the ICC that "the fisheries did have value and were an asset to the land" (LA. 3666). This is because whether the treaty privilege is deemed a "usufruct," "license," "profit a prendre" or a "franchise," these are all interests in or to land which are encapsulated in a payment based on full fee title (LA. 3388-3393). "[T]he value of fish, game, and vegetation on the ceded lands was subsumed within the estimated value of the land in general." Klamath, 473 U.S. 768, 773-4. The experts for the Bands in Docket 18-C at the ICC claimed that the valuation of the acreage based on the value of the area for pine timber, yielded the highest per acre dollar value. The 1974 damage award of over nine million dollars "in full satisfaction" (SA. 526) of all Docket 18-C claims was based on a full fee value, without any offsets for any retained interests, and included payment for all acres of land and water (LA.3274) in the ceded territory.[40]

The premise of the lower courts' rulings is that the treaty privilege is not a subset of fee simple under real property law and therefore a separate payment for hunting and fishing rights would have to be set forth in the ICC Docket 18-C award if the Bands were actually compensated for the treaty privilege. Exactly the opposite is true.

> The Tribe finally contends that the absence of any payment expressly in compensation for hunting and

---

[39] The Commission itself stated that, "[t]his case [18-C] is similar to the claims presented by the Minnesota Chippewa and others in Docket Nos. 18-S and 18-T." (LA. 4367).

[40] The ICC paid the Bands for all the waters in the 1837 area by utilizing the dollar value per acre as if all the waters were pine timber.

> fishing rights on the ceded lands demonstrates that the parties did not intend to extinguish such rights in 1901 . . . As explained above, that assumption is incorrect. . . . the value of fish, game, and vegetation on the ceded lands was subsumed within the estimated value of the land in general. Indeed, had the parties actually intended to preserve independent hunting and fishing rights for the tribes on the ceded lands, the Boundary Commission presumably would have computed the value of such rights and explicitly subtracted that amount from the price to be paid for land so encumbered.

Klamath, 473 U.S. at 773-4. When specifically referring to the Indian Claims Commission proceedings, the Court stated:

> the Tribe has since been afforded an opportunity to recover additional compensation for the ceded lands, in light of the '**unconscionable**' **amount** paid in 1906. 20 Ind. Cl. Comm'n at 530. Yet, in that proceeding, which resulted in an award to the Tribe over $4 million. . . . the Tribe apparently agreed that the 'highest and best uses' for the ceded lands were commercial lumbering and livestock grazing, again without mention of any hunting and fishing rights. The absence of specific compensation for the rights at issue is entirely consistent with our interpretation of the 1901 Agreement.

Klamath, 473 U.S. at 774 (emphasis added). Those circumstances are virtually identical to those of the Chippewa whose final, amended Docket 18-C Complaint sought an award for the "fair and just compensation or consideration for the lands ceded . . . [and] damages resulting from defendant's failure to deal fairly and honorably . . . " (SA. 524). The

Bands described their Docket 18-C action as "an unconscionable consideration claim arising out of the cession . . . by the treaty of July 29, 1837 . . ." (LA. 3722). Since the Bands had claimed and admitted in their original Docket 18 Petition that the hunting and fishing privilege was a material part of the consideration for the 1837 cession (SA. 468, LA. 3184-3185), and since the Docket 18-C damages award paid the Bands for all inadequacies in consideration under the 1837 treaty, the Bands have been paid for the value of the treaty privilege.

The Docket 18-C ICC award was based on full fee title, after the Bands first proved they previously held recognized title to the 1837 ceded area.[41] The Ninth Circuit has concluded that when Bands receive damages from the ICC for all inadequacies in the cession of Indian title, the Bands were paid for any hunting or fishing rights.[42] Both aboriginal and treaty reserved hunting and fishing rights are presumed lost, and taken, as the result of an ICC award. The Eighth Circuit classified the privilege as something other than Indian title or an interest in or to land, evading its prior rulings that real property claims came within the exclusive jurisdiction of the ICC.[43]

---

[41] "[B]oth aboriginal and treaty-recognized title carry with them a right to use the land for the Indians' traditional subsistence activities of hunting, fishing, and gathering." Lac Courte Oreilles v. Voight, 700 F.2d 341, 351-52 (7th Cir. 1983) (cert. den., 464 U.S. 805).

[42] Western Shoshone National Council v. Molini, 951 F.2d 200, 203 (9th Cir. 1991); United States v. Dann, 873 F.2d 1189 (9th Cir. 1989) (cert. den.); Wahkiakum Band Chinook Indians v. Bateman, 655 F.2d 176, 181 (9th Cir. 1981); See United States v. Pend Oreille Public Utility Dist., No. 1, 926 F.2d 1502, 1508 (9th Cir. 1991).

[43] Oglala Sioux Tribe v. United States, 650 F.2d 142 (8th Cir. 1981); Oglala Sioux Tribe v. Homestead Mining Co., 722 F.2d 1401 (8th Cir. 1983).

The Supreme Court needs to resolve this dispute between the Circuits regarding the proper application of Klamath especially since there are 312 Bands that received an ICC award (LA. 1835). The Court must send a clear message to the Circuits that the ruling in Klamath bars treaty based hunting and fishing claims by Bands which received damages from the ICC for the treaty lands and waters. If such a message is not sent, the Eighth Circuit has drawn the navigational chart for all Bands who were compensated by the ICC for lost lands or reservations to commence collateral litigation against states seeking hunting and fishing rights with respect to the areas sold and for which the tribes were paid.

CONCLUSION

For the aforestated reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

Gary E. Persian
Counsel of Record
PERSIAN MacGREGOR
& THOMPSON
1530 International Centre
900 Second Avenue South
Minneapolis, MN 55402
(612) 339-6733

Of Counsel:
Stephen G. Froehle
Randy V. Thompson